

Appeal from decision of New Mexico State Office, Bureau of Land Management, dismissing protest to proposed reinstatement of noncompetitive oil and gas lease NM-12253.

Affirmed.

1. Administrative Procedure: Rulemaking -- Notice: Generally -- Oil and Gas Leases: Reinstatement -- Regulations: Force and Effect as Law -- Regulations: Publication

BLM may approve a petition for reinstatement, filed under section 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), for a noncompetitive oil and gas lease, which terminated automatically prior to Jan. 12, 1983, for failure to pay the annual rental on or before the lease anniversary date, where the lessee has complied with the statutory requirements for reinstatement. In cases where petitions have been filed prior to publication of the requirement to pay back rentals at the new rate of \$5 per acre, or notification of that requirement by BLM, petitioner is properly given an opportunity to tender the additional amount required.

APPEARANCES: James B. Grant, Esq., Santa Fe, New Mexico, for appellant; George R. Glass, Esq., Santa Fe, New Mexico, for TXO Production Corporation; Suzette C. Chafin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Robert P. Creson has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated March 27, 1984, dismissing his protest of the proposed reinstatement of noncompetitive oil and gas lease NM-12253.

Effective September 1, 1970, BLM issued a 10-year noncompetitive oil and gas lease to Guy M. Willis, for 800 acres of land situated in secs. 34 and 35, T. 6 S., R. 26 E., New Mexico Principal Meridian, Chaves County, New Mexico, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1982). The annual lease rental was \$400 (50 cents per acre). Effective December 1, 1972, BLM approved an assignment of the lease to the Texas Oil & Gas Corporation, now TXO Production Corporation (TXO).

By decision dated May 11, 1981, BLM granted a 2-year extension of the lease, until August 31, 1982, because of diligent drilling operations at the end of the lease's primary term. On September 1, 1981, the lease terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date, pursuant to section 31(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(b) (1982). On June 29, 1982, TXO filed a petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) (1982), contending that it had "inadvertently" failed to pay the annual rental timely. TXO's petition was denied in a July 16, 1982, BLM decision. No appeal was filed from that decision.

During the pendency of appellant's initial petition for reinstatement, the land subject to oil and gas lease NM-12253 was included in a July 1, 1982, simultaneous oil and gas lease offering (parcel 167). In an August 1982 drawing, appellant's simultaneous oil and gas lease application, NM-54262, was drawn with first priority for parcel 167, with priority as of August 18, 1982.

On January 12, 1983, the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), P.L. 97-451, was passed. Section 401 of this Act provided an additional basis for reinstatement of oil and gas leases. 30 U.S.C. § 188(d) through (i) (1982). On May 10, 1983, TXO filed another petition for reinstatement of oil and gas lease NM-12253, contending that its failure to pay the annual rental on or before September 1, 1981, was inadvertent, justifiable and not due to a lack of reasonable diligence. TXO stated that, on June 23, 1980, it had entered into a farmout agreement with B & C Drilling Company, which would drill and operate wells on the land covered by the lease, and that the failure to make the rental payment timely was due to the following reasons:

During the period immediately preceding September 1, 1981, the Midland, Texas, Land Department of Petitioner was going through a period of rapid transition, resulting in a loss of experienced personnel who were replaced by some less experienced personnel. A new land man failed to understand the nature of this Lease, to note that there was a Farmout Agreement and that payment must be made to protect the farmout operator.

TXO further stated that one well was spudded on August 31, 1980, under the farmout agreement, and drilled to a depth of 1,237 feet, and that

because of positive geological indicia, the farmout operator desired to exercise its two-year option under the Farmout Agreement to earn deeper leasehold rights by drilling a well to a greater depth in two years and was in the process of preparing to

drill a deep test when it was discovered [that the annual rental had not been paid on September 1, 1981].

TXO stated that it discovered the error and submitted a check in payment of the late rental to BLM on or about December 15, 1981, but that payment was refused. TXO then tendered a second check for \$400 which was accepted by BLM on September 1, 1982. TXO submitted an additional check in the amount of \$900 with its petition for reinstatement and on August 31, 1983, BLM received a third check in the amount of \$400. The total of these three submittals was \$1,700.

On May 24, 1983, appellant filed a protest to reinstatement of TXO's oil and gas lease, contending that TXO's failure to pay timely cannot be considered justifiable or not due to a lack of reasonable diligence because TXO must bear the consequences of the "ignorance and incompetence" of its employees. In addition, appellant argued that the failure to pay timely cannot be considered inadvertent, as that term is defined, because TXO, "acting through its employee, deliberately failed to pay [the] * * * rental which fell due September 1, 1981." Appellant concluded that TXO was aware of the rental requirement and that it is "specious" to suggest that a "large, experienced and well known independent oil and gas operator" failed to act through inadvertence. TXO submitted a response to appellant's protest, contending again that the failure to pay timely was inadvertent and that TXO promptly tendered the payment when the error was discovered.

By decision dated December 22, 1983, BLM set forth certain requirements for reinstatement of oil and gas lease NM-12253. These requirements included payment of annual rentals for each year since September 1, 1981, at the new rate of \$5 per acre, and the acceptance of new lease terms (increasing the rental rate to \$5 per acre or fraction thereof and the royalty rate to 16-2/3 percent) by execution of documents which had been enclosed with the BLM decision. BLM required compliance within 30 days of receipt of the decision and stated that the \$1,700 already received would be credited against the \$12,500 owing, resulting in a deficiency of \$10,800. On January 19, 1984, BLM received a check in the amount of \$10,900 (the additional \$100 to cover the cost of publication of the notice of the proposed reinstatement in the Federal Register) and the executed documents. Notice of the proposed reinstatement was published on February 17, 1984. See 49 FR 6184 (Feb. 17, 1984). The Federal Register notice was of a BLM decision dated February 10, 1984, that TXO's lease would be reinstated effective September 1, 1981.

In its March 1984 decision, BLM dismissed appellant's protest because "[p]ursuant to the provisions of P.L. 97-451, all conditions for the reinstatement of terminated oil and gas lease NM-12253 have been met."

In its statement of reasons for appeal, appellant again contends that TXO's failure to pay the annual rental on or before September 1, 1981, was deliberate and that its mere assertion of inadvertence is not sufficient without proof thereof. Appellant further states that BLM failed to exercise its discretion and to make "findings based on facts" with respect to TXO's inadvertence, in accordance with Instruction Memorandum (IM) No. 83-372 dated March 10, 1983. Appellant concludes that BLM merely concluded that the "conditions" for reinstatement had been satisfied, i.e., the late rental had

been paid at the new rates. Appellant requests a hearing to establish TXO's inadvertence or lack thereof. In the alternative, appellant contends that dismissal of his protest violates his due process rights, citing Marathon Oil Co. v. Andrus, 452 F. Supp. 548 (D. Wyo. 1978).

In response to appellant's statement of reasons, BLM admits that reinstatement is subject to its discretion under section 401 of FOGRMA, supra, but concludes that there were sufficient facts for BLM to hold that TXO's failure to pay timely was inadvertent. BLM cites the fact that it had no reason to question the credibility of TXO in asserting inadvertence as the cause of its failure to pay timely and the fact that TXO was operating under a farmout agreement, with plans to drill additional wells. BLM notes that appellant has provided no evidence that failure to pay timely was deliberate.

[1] This case raises the question of whether TXO was entitled to reinstatement of noncompetitive oil and gas lease NM-12253 pursuant to section 401 of FOGRMA, supra.

Section 401 of FOGRMA, supra, provides:

Where any oil and gas lease issued pursuant to section 226(b) or (c) of this title or the Mineral Leasing Act for Acquired Lands (30 U.S.C. 351 et seq.) has been, or is hereafter, terminated automatically by operation of law under this section [30 U.S.C. § 188] for failure to pay on or before the lease anniversary date the full amount of the rental due, and such rental is not paid or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was justifiable or not due to lack of reasonable diligence on the part of the lessee, or, no matter when the rental is paid after termination, it is shown to the satisfaction of the Secretary that such failure was inadvertent, the Secretary may reinstate the lease as of the date of termination for the unexpired portion of the primary term of the original lease or any extension thereof remaining at the date of termination, and so long thereafter as oil or gas is produced in paying quantities. In any case where a lease is reinstated under this subsection and the Secretary finds that the reinstatement of such lease (A) occurs after the expiration of the primary term or any extension thereof, or (B) will not afford the lessee a reasonable opportunity to continue operations under the lease, the Secretary may, at his discretion, extend the term of such lease for such period as he deems reasonable, but in no event for more than two years from the date the Secretary authorizes the reinstatement and so long thereafter as oil or gas is produced in paying quantities. [Emphasis added.]

30 U.S.C. § 188(d)(1) (1982). With respect to leases which terminated prior to January 12, 1983, as in the present case, the statute provides that such leases will not be reinstated unless "a petition for reinstatement together with the required back rental and royalty accruing from the date of termination, is filed with the Secretary on or before the one hundred and twentieth day after January 12, 1983 * * *." 30 U.S.C. § 188(d)(2)(A)(ii) (1982).

The record indicates that TXO's petition for reinstatement was filed in a timely manner in accordance with 30 U.S.C. § 188(d)(2)(A)(ii) (1982), i.e., on or before May 12, 1983. However, we must first consider the question whether TXO's tender of the appropriate back rental was timely. For the reasons outlined below, we conclude that TXO submitted the appropriate back rental in a timely manner.

As noted, 30 U.S.C. § 188(d)(2)(A)(ii) (1982) provides that a petition for reinstatement must be submitted with the "required back rental." That statutory provision does not define "required back rental." However, 30 U.S.C. § 188(e) (1982) provides in relevant part:

Any reinstatement under subsection (d) of this section shall be made only if these conditions are met:

* * * * * * *

(2) payment of back rentals and either the inclusion in a reinstated lease issued pursuant to the provisions of section 226(b) of this title of a requirement for future rentals at a rate of not less than \$10 per acre per year, or the inclusion in a reinstated lease issued pursuant to the provisions of section 226(c) of this title of a requirement that future rentals shall be at a rate not less than \$5 per acre per year, all as determined by the Secretary. [Emphasis added.]

This latter statutory provision is currently read in *pari materia* with the former provision to require that the back rental required to be submitted with a petition for reinstatement "be at a rate not less than \$5 per acre per year." See Kurt W. Mikat, 82 IBLA 71 (1984). It is evident that TXO did not comply with this current interpretation, having tendered only \$1,700 on or before May 12, 1983. ^{1/} Nevertheless, we conclude that because of the ambiguity at the time TXO's petition was filed and the necessity for subsequent Departmental implementation, TXO was properly given an opportunity to comply with the statute.

At the time TXO filed its petition the statute was inherently ambiguous because 30 U.S.C. § 188(e)(2) (1982) can equally be read as a reiteration of the requirement that payment of back rentals is a condition precedent to reinstatement and that a reinstated lease is to include a provision that future rentals be at a rate of not less than \$5 per acre per year. The existence of this ambiguity is well illustrated by the fact that, after a period of Departmental indecision regarding the proper interpretation of the requirement to pay back rentals, ^{2/} the House Committee on Interior and Insular Affairs on July 13, 1983, adopted the following resolution which declared the intent of Congress in enacting section 401 of FOGRMA:

^{1/} As of May 12, 1983, back rental had accrued from the date of termination for 2 lease years, i.e., Sept. 1, 1981, to Aug. 31, 1982, and Sept. 1, 1982, to Aug. 31, 1983. In addition, administrative costs (not to exceed \$500) and publication costs are to be paid by the petitioner.

^{2/} See Kurt W. Mikat, supra, for a discussion of this matter.

That, when the Secretary of the Interior exercises his discretionary authority to reinstate any former leases under Public Law 97-451, the provisions of section 401(e) of Title IV of Public Law 97-451 with regard to the increased rental and royalty terms for a reinstated * * * noncompetitive lease * * * require that payment of back rentals and royalties be equal to the amounts which are established as minimum future rentals and royalties for each such reinstated lease[.] [Emphasis added.]

However, prior to this congressional statement of intent, the statute, by itself, was not sufficiently clear to put a lessee seeking reinstatement on notice that back rental was also to be paid at the rate of not less than \$5 per acre.

We recognize that BLM was operating under IM No. 83-183 at the time TXO submitted its petition for reinstatement and that under IM No. 83-183 a lessee was required to pay back rental at the rate of \$5 per acre. However, this instruction was never codified in the form of a regulation and TXO was not notified prior to May 10, 1983, the date that TXO filed its petition for reinstatement, that back rental was to be paid at the rate of \$5 per acre. ^{3/} Moreover, we consider the Departmental interpretation of 30 U.S.C. § 188(c) that back rentals shall be computed at the same rate as is provided for future rentals is a determination of general applicability, which must be published in the Federal Register pursuant to section 3(a)(1)(D) of the Administrative Procedure Act (APA), as amended, 5 U.S.C. § 552(a)(1)(D) (1982). ^{4/} IM No. 83-183 was not so published. In such circumstances, section 3(a)(1) of the APA, as amended, 5 U.S.C. § 552(a)(1) (1982), provides that: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." Accordingly, we conclude that not having actual and timely notice, TXO cannot be held to compliance with IM No. 83-183 where to do so would adversely affect TXO. See Morton v. Ruiz, 415 U.S. 199 (1974); Gulf States Manufacturers, Inc. v. NLRB, 579 F.2d 1298 (5th Cir. 1978).

Finally, we note that TXO promptly and timely submitted the required back rental in response to the December 22, 1983, BLM decision which gave TXO actual notice of the requirement to pay back rental at the rate of \$5 per acre.

^{3/} The fact that the lessee in Mikat was given actual notice of the requirement to tender back rental at the rate of \$5 per acre with his petition for reinstatement distinguishes Mikat from the present case. In Mikat, we held that, under the circumstances of that case, the lessee was not entitled to reinstatement where his back rental had been submitted at the rate of \$1 per acre, rather than the \$5 per acre called for.

^{4/} We note that the Department recently published proposed rules in the Federal Register which state, in relevant part, that the "required back rental" which accompanies a petition for reinstatement, with respect to leases which terminate on or after Jan. 12, 1983, shall be "at the increased rates accruing from the date of termination." 43 CFR 3108.2-3(a) (49 FR 4220 (Feb. 3, 1984)). See Jerry Chambers Exploration Co., 80 IBLA 123, 125 (1984).

We next reach the question of whether TXO's failure to pay the annual rental on or before September 1, 1981, was "inadvertent" under section 401 of FOGRMA, supra. At the outset, we note that the March 1984 BLM decision does not set forth the statutory basis for the TXO reinstatement (i.e., whether the failure to make payment in a timely manner was justifiable, not due to a lack of reasonable diligence or inadvertent). However, the record adequately supports a finding that the failure to pay timely was inadvertent. We have no reason to doubt TXO's statement that the employee in charge of making the rental payment on or before September 1, 1981, was not familiar with the rental requirement under Federal lease NM-12253 and that he simply neglected to pay the rental timely. TXO submitted a letter to BLM, shortly after it had discovered the error and promptly sought to correct it by tendering the rental due. 5/

Appellant has requested a hearing to consider the question of whether TXO's failure to pay its annual rental timely was the result of inadvertence. However, appellant has submitted no evidence which gives rise to a factual question and suggests that a hearing might be productive of a different result. In the absence of such circumstances, we will deny appellant's request. Alumina Development Corporation of Utah, 77 IBLA 366 (1983); Paul N. Temple, 69 IBLA 54 (1982). Finally, we cannot discern how appellant's due process rights have been violated by dismissal of his protest. Altex Oil Corp., 73 IBLA 73 (1983).

Thus, we conclude that TXO's noncompetitive oil and gas lease NM-12253, may properly be reinstated in accordance with section 401 of FOGRMA, supra. Moreover, we hold that BLM properly dismissed appellant's protest of the proposed reinstatement.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

5/ There is little question that TXO acted diligently in the attempts to have the lease reinstated. Prior to passage of FOGRMA, a private bill had been introduced in Congress providing for reinstatement of the lease. Section 401 of FOGRMA was enacted for the specific purpose of affording the type of relief sought by TXO through private legislation.